Order

Michigan Supreme Court
Lansing, Michigan

April 29, 2022

162434-5

In re Guardianship of VERSALLE, Minors.

SC: 162434-5
COA: 351757; 351758
Muskegon PC: 2019-002586-GM
2019-002589-GM

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Following oral argument on the application for leave to appeal the October 15, 2020 judgment of the Court of Appeals, the parties were directed to file supplemental briefs. The supplemental briefs having been received, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

WELCH, J. (*concurring*).

I concur with the majority's decision to deny leave because, as the parties agree, the Court of Appeals correctly interpreted MCL 700.5204(2)(b). The statute allows a court to create a guardianship when "[t]he parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed." The parties agree that those requirements were satisfied at the time petitioner filed her guardianship petitions. The parties also agree, and the legislative history is clear, that the Legislature intended courts to analyze the requirements on the basis of the facts existing at the time of filing. The only dispute remaining between the parties is whether MCL 700.5204(2)(b) complies with the constitutional rule that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion of O'Connor, J.). I agree with the majority and the dissent that respondent's facial challenge to the constitutionality of MCL 700.5204(2)(b) fails. I write separately to express my concerns that, even though it is *facially* valid, MCL 700.5204(2)(b) presents a substantial risk of unconstitutional application.

I. FACTS AND PROCEDURAL HISTORY

In May 2019, Barbara Versalle petitioned for guardianship of her two granddaughters under MCL 700.5204(2)(b). The petitions alleged that, from 2009 to 2014, respondent father Adam Versalle was in prison for domestic-violence and drug convictions. In 2015, the children's mother died. The children often stayed with petitioner while respondent struggled to establish a stable living situation. In September 2017, respondent was evicted from his apartment, and the children came to live with petitioner full time. Respondent did not give petitioner any written legal authority to care for the children. He told her to "sign his name" on school enrollment paperwork. Respondent moved to Texas in December 2017. He refused a subsequent request for written legal authority by stating, "You are not going to take my daughters away from me." According to petitioner, respondent did not provide consistent financial support for the children. At times, he provided up to $150 per week, but months went by when he provided nothing.

Petitioner prepared the petitions in January 2019, asserting that she was having trouble taking the children to the doctor. She did not file until May 2019. When asked if the children were denied necessary medical care between January and May, petitioner admitted that they did not need any medical care but stated that they were due for checkups. According to petitioner, respondent had not, in any way, revoked permission for the girls to live with her until June 2019—a month after the petition was filed. In June 2019, he took the girls to Texas, telling petitioner they would be back in two or three weeks. The children have remained with respondent in Texas ever since, despite the subsequent court orders in this case requiring their return.

In August 2019, the trial court held a hearing on the petitions. Petitioner testified as outlined earlier. Respondent's counsel reported that respondent had "chosen not to be present" because counsel had "no written documentation requiring him to be here." He therefore did not place any evidence in his favor on the record.

The trial court granted the guardianships, finding that petitioner had established statutory grounds under MCL 700.5204(2)(b). The court found that the children began living with petitioner with respondent's permission in September 2017 and that he had not given petitioner legal authority to care for the children. However, the court found that it was respondent's "clear intention" to revoke permission for the children to live with petitioner when he took them to Texas in June 2019. Nonetheless, the court concluded that the requirements of MCL 700.5204(2)(b) were satisfied at the time the petition was filed. As to respondent's argument that MCL 700.5204(2)(b) does not comply with *Troxel*, the trial court agreed "that there is a presumption that [respondent] has a right that is superior to all others." But, the court noted, the *Troxel* presumption has a best-interest component. As a result of respondent's failure to present evidence in his favor, the court had "no idea if this serves the best interest of these children . . . to be in his care and custody at this time." The court therefore concluded that the *Troxel* presumption had been rebutted.

The Court of Appeals affirmed in a published opinion, holding that MCL 700.5204(2)(b) adequately incorporated the "traditional presumption that a fit parent will act in the best interest of his or her child." *In re Versalle Guardianship*, 334 Mich App 173, 178 (2020) (quotation marks and citation omitted). The Court of Appeals held that that first prong of MCL 700.5204(2)(b)—"the parent or parents permit the minor to reside with another person"—incorporates the *legal* definition of residence: "a place of abode accompanied with the intention to remain." *Id.* at 181 (quotation marks and citation omitted). MCL 700.5204(2)(b) further requires that "[t]here must also be no grant of legal authority for a child's care and maintenance . . . ." *Id.*, citing MCL 700.5215(c) (outlining the legal duties of a guardian). Therefore, the Court of Appeals concluded, "[t]he requirements of MCL 700.5204(2)(b) essentially demonstrate a situation in which a parent has stopped providing adequate care for a child and a guardian needs to step in to provide for the child." *Versalle*, 334 Mich App at 183. The court further concluded that the requirements of MCL 700.5204(2)(b) were satisfied in this case, noting that "[b]ecause respondent decided not to attend the hearing to present his own evidence, petitioner's testimony is uncontradicted." *Id.* at 186.

This Court granted oral arguments on respondent's application, directing the parties to address (1) whether MCL 700.5204(2)(b) is constitutional under *Troxel*, and (2) whether the trial court erred by granting a guardianship in this case. *In re Versalle Guardianship*, 507 Mich 995 (2021). Following those oral arguments, this Court ordered supplemental briefing on "whether the requirements of MCL 700.5204(2)(b) must be met when the guardianship petition is filed or at the time the guardianship determination is made . . . ." *In re Versalle Guardianship*, ___ Mich ___, ___; 967 NW2d 238 (2021).

II. ANALYSIS

I respectfully disagree with the dissent that the Legislature intended the requirements of MCL 700.5204(2)(b) to be met both at the time a guardianship petition is filed and at the time of the hearing on the petition. Again, the statute provides that a court may create a guardianship if:

> The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed. [MCL 700.5204(2)(b).]

This language permits two plausible interpretations. Either (1) the court may grant a guardianship if all three requirements are met "when the petition is filed," or (2) that phrase only applies to the third requirement while the first two requirements must also be satisfied at the time the trial court makes its ruling. As the parties agree, the legislative history clearly resolves the ambiguity in favor of the first interpretation. The House

Fiscal Agency's analysis of SB 1210 begins by identifying an "apparent problem" with MCL 700.5204(b) brought to the Legislature's attention by the Lieutenant Governor's Children's Commission:

> Many courts have interpreted a provision of the law allowing for appointment of a guardian when a child has been left with a third party without that person having been given legal authority over the child as only applying while the child is in the custody of the third party. In some cases, this results in the court refusing to consider appointment of a guardian if the parent or parents retrieved the child before the hearing on the petition could be held, even if the same situation has occurred previously. *It has been suggested that the law should be changed to make it clear that a court may continue a proceeding to appoint a guardian even after the parents have retrieved the child.* [House Legislative Analysis, SB 1210 (December 9, 1998), p 1 (emphasis added).]

The analysis explained that an amendment was needed to fix the problem:

> [T]he [amendment] would provide that a court could appoint a guardian where the parent or parents had permitted the minor to reside with another party without providing that person with legal authority for the care and maintenance of the minor, even if the parents had taken the child back after the petition had been filed. [*Id*.]

By providing that a court may only grant a guardianship if "the minor is not residing with his or her parents when the petition is filed," the Legislature provided that the parent may, by retaking physical custody, revoke permission for the minor to reside with a third party. However, whether a parent revokes permission by retaking physical custody after a petition is filed is irrelevant to the trial court's ability to grant a guardianship. I do not think the Legislature chose language that achieved its stated goal to "make it clear," but the legislative history resolves any ambiguity. The Legislature unequivocally intended to prevent what respondent did here—attempting to defeat a guardianship petition by retaking physical custody of the children after the petition had been filed.

The vagaries of the statutory language pile up from there. What does it mean to "permit the minor to reside with another person"? And how does that vague requirement interact with the vague constitutional presumption that "there will *normally* be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children"? *Troxel*, 530 US at 68-69 (opinion of O'Connor, J.) (emphasis added). The Court of Appeals correctly recognized that MCL 700.5204(b) would be unconstitutional if a third party could legally displace a parent simply because the parent allows a child to stay with the third party on a temporary basis without providing legal authority. *Versalle*,

334 Mich App at 178-181. Therefore, "permit the minor to reside with another person" must incorporate the legal sense of "residence"—a place of abode with the third party, coupled with the parent's intention that the child remain there. *Id*. at 181. I agree with Court of Appeals that this is the interpretation of the "permission to reside" requirement intended by the Legislature and required by the Constitution.

I also agree that respondent's facial challenge to the constitutionality of MCL 700.5204(b) fails. Throughout this litigation, respondent has led with the argument that MCL 700.5204(b) does not protect the presumption that a parent is fit. In other words, he has argued that the statute is unconstitutional because it allows a guardianship to be granted without a fitness determination. However, in *Hunter v Hunter*, 484 Mich 247, 267 (2009), this Court expressly rejected the argument that a custody statute must provide for a parental-fitness determination in order to comply with *Troxel*. Rather, *Troxel* requires a presumption "that fit parents act in the best interests of their children." *Troxel*, 530 US at 68 (opinion of O'Connor, J.). Although a showing that a parent is unfit will always be *sufficient* to rebut that presumption, it is not *necessary*. See *Hunter*, 484 Mich at 271 ("[W]e hold that due process does not require a fitness determination where the statute does not mandate it . . . ."). A heightened showing that a parental decision is not in a child's best interests is also sufficient to rebut the presumption. See *id*. at 266 (holding that the requirement in the Child Custody Act (CCA), MCL 722.21 *et seq*., that there be a showing *by clear and convincing evidence* that custody with a parent is not in the child's best interests "satisfies constitutional scrutiny under *Troxel*").

To restate, a statute can satisfy *Troxel* in two ways, either one of which is sufficient: (1) by requiring a showing that the parent is unfit, or (2) by requiring a heightened showing that a parental act or decision is not in the child's best interests. I agree with the Court of Appeals that MCL 700.5204(2)(b) incorporates Method 1 closely enough to survive respondent's facial challenge. In many cases, the act of leaving a child with a third party long-term without some indication of when the parent will retake custody, and without providing the third party with legal authority to respond to emergencies, will be functionally identical to an enumerated ground of unfitness under the juvenile code—leaving a child "without proper custody or guardianship." MCL 712A.2(b)(1)(C) (defining "without proper custody or guardianship" in the negative by stating that it "does not mean a parent has placed the juvenile with another person who is *legally* responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance").

Respondent attempts to split apart the "permit to reside" and "legal authority" prongs of MCL 700.5204(2)(b) and argues that neither, on its own, shows parental unfitness. Respondent argues that a responsible parent facing a difficult situation might have the child live with another person long-term without an express plan to retake physical custody. I agree. Respondent also argues that a parent should not be penalized for failing to sign over their authority to make child-rearing decisions to another person.

Again, I agree. But when the two prongs are *combined* as they are in MCL 700.5204, they will, *in many cases*, describe a parent who has "essentially stopped providing adequate care for the children, i.e., became unfit." *Versalle*, 334 Mich App at 182. Therefore, I conclude that respondent has failed to "establish that no set of circumstances exists under which the act would be valid." *League of Women Voters of Mich v Secretary of State*, ___ Mich ___ (2022) (Docket Nos. 163711, 163712, 163744, 163745, 163747, and 163748); slip op at 8 (quotation marks, citations, and brackets omitted).

However, there is still enough of a gap between the statute's requirements and parental fitness that I consider MCL 700.5204 constitutionally hazardous, even if it is *facially* valid. We can easily imagine a single parent who strives to financially support a child, but makes a tough decision—in the child's best interests—that a third party, perhaps a retired grandparent, is better able to meet the child's need for day-to-day attention. Unless the parent is a lawyer or can afford to consult one, they are unlikely to recognize that a formal grant of legal authority is necessary to protect their parental rights. Further, such a parent might fear, as respondent did in this case, that providing legal authority will somehow waive the right to change their mind about where the child lives. The parties might informally agree that the parent will always be available to make legal decisions. If such a parent financially supports the child and abides by the verbal agreement to always be available for legal decisions, emergency or otherwise, can a court really say that the parent is legally unfit?

I recognize that those are not the facts of this case. But I also recognize that "*Troxel* established a floor or *minimum* protection against state intrusion into the parenting decisions of fit parents." *Hunter*, 484 Mich at 262 (emphasis added). In *Hunter*, this Court held that *Troxel* was satisfied by the *express* parental presumption contained in the CCA. See MCL 722.25(1) ("If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence."). This Court explained:

> The clear and convincing evidence standard is the most demanding standard applied in civil cases. This showing must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.
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> We agree with the Court of Appeals in *Heltzel* [*v Heltzel*, 248 Mich App 1 (2002)] that, given the unique constitutional considerations in custody disputes involving natural parents, it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were

> maintained with him. A third party seeking custody must meet a higher threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody. [*Hunter*, 484 Mich at 265 (cleaned up).]

Furthermore, this Court held, "[i]n order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c)." *Id.* at 263.

MCL 700.5204(2)(b) does not include an express parental presumption like that in the CCA; it is unclear why it does not, given the similar concerns raised with child custody and guardianships. In this case, it is doubtful that petitioner would have been able to rebut such a presumption by clear and convincing evidence. Even though respondent did not present evidence in his favor, petitioner did not present *clear* evidence that her household was a better environment for the children.

I do not suggest that only a presumption like that in the CCA can satisfy *Troxel*. Again, *Troxel* is vague and provides a "floor or minimum protection . . . ." *Hunter*, 484 Mich at 262. It is unclear whether the requirements of MCL 700.5204(2)(b), as imperfect as their overlap with parental fitness is, provide more or less protection than the parental presumption in the CCA. See *Hunter*, 484 Mich at 267 (holding that "*Troxel* does not require a threshold determination of parental fitness in custody cases if no statutory requirement exists.") (formatting altered). Given the facts of this case and the lack of congruence between the requirements of MCL 700.5204(2)(b) and parental fitness, I conclude that there will be cases in which the CCA provides more protection than MCL 700.5204(2)(b).

This is troubling because a guardianship under MCL 700.5204(2)(b) can function as the practical equivalent of a full transfer of custody to a third party under the CCA. Once a guardianship is established, a parent must petition to terminate the guardianship under MCL 700.5208. Doing so subjects the parent to a best-interest determination (with no presumption in favor of the parent), under which a guardian's superior resources and concerns for maintaining the children's custodial environment can have a dramatic influence. This can potentially occur even in cases where there is a poor fit between the requirements of MCL 700.5204(2)(b) and the parent's fitness. As has been noted, a parent who is inferior to the guardian only in financial resources could find themselves facing this quagmire without the assistance of counsel. See *In re Orta Guardianship*, 508 Mich 913, 914 (2021) (CAVANAGH, J., concurring). Furthermore, such a parent may, at the court's discretion, be ordered to pay support to a guardian with superior resources or be denied the parenting time necessary to maintain a bond with the children—a bond that will factor into a best-interest analysis should the parent petition for termination of the guardianship. I therefore share the dissent's concern that MCL 700.5204(2)(b) may

subject a parent to a de facto termination of parental rights without the protections and services that termination proceedings entail.

In this case, respondent was able to obtain counsel. As the children have remained in his care since June 2017, he will likely be successful in petitioning to terminate the guardianship. Other parents will not be so fortunate. And years of divisive and uncertain litigation of constitutional magnitude likely could have been avoided if MCL 700.5204(2)(b) contained an express parental presumption like that in the CCA. I urge our Legislature to consider that simple option for avoiding future cases like this one—cases that *will not* be in the best interests of the children involved.

CAVANAGH, J. (*dissenting*).

I respectfully dissent from this Court's denial order. While I agree that respondent's constitutional challenge to MCL 700.5204(2)(b) falls short, I would hold that the probate court's decision to grant the guardianships was an abuse of discretion because the conditions of the statute were not met at the time of the guardianship hearing.

The minor guardianships at issue in this case are governed by MCL 700.5204(2)(b) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. This section provides:

> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
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> * * *
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

We review a probate court's findings of fact for clear error. *In re Redd Guardianship*, 321 Mich App 398, 403 (2017). A probate court's dispositional ruling is reviewed for an abuse of discretion. *Id*.

The facts of this case are not in dispute. Respondent-father, Adam Versalle, was the sole custodian of the minor children after their mother passed away in 2015. In September 2017, the children went to live full-time with petitioner, Barbara Versalle, their paternal grandmother, because Adam was unable to provide a stable home. While Adam allowed the children to live with Barbara, he refused to give her power of attorney over the children because he feared that Barbara would "take [his] daughters away." At some point, Adam moved to Texas, and the children would travel there to visit him on school breaks.

On May 9, 2019, while the children, then ages 14 and 12, were living with her in Michigan, Barbara filed petitions seeking to be appointed their legal guardian. Shortly thereafter, and following the conclusion of the school year, Adam retrieved the children from Michigan and brought them to Texas. While Barbara testified that she believed the children would return after a two- to three-week visit, Adam did not bring the children back to Michigan. The Department of Health and Human Services (DHHS) conducted a study of Barbara's home and recommended that the probate court deny the guardianship, noting that "the children are currently residing with their biological father and are not without proper care and custody." Following a hearing on August 12, 2019, the probate court entered orders of temporary guardianship over the children. Adam filed an ex parte motion for relief from the temporary guardianship orders, arguing that the court erred by granting them at a hearing without testimony in violation of MCR 5.403. He also filed a motion to dismiss.

Instead of ruling on the motions, the probate court held a full hearing on the guardianship petitions on August 28, 2019. Barbara appeared with counsel, while Adam elected to defend the case through counsel and did not appear in person. At the conclusion of the hearing, the probate court found that, at the time the petitions were filed, the children were residing with Barbara with Adam's permission and that Adam had not provided Barbara with legal authority over the children. Therefore, the probate court concluded that the petitions were legally sufficient at the time they were filed. The court, however, went on to recognize that Adam's "clear intention" when he returned to Michigan in June and took the children back to Texas was to regain custody. The probate court agreed that Adam was constitutionally entitled to a presumption that his right to the children was superior to the claims of others, but concluded that the presumption of parental fitness was rebuttable and that it had been rebutted because Adam did not appear at the hearing. The probate court acknowledged that it had "no idea" if it served the children's best interests to remain in Adam's care and custody, but that, based on the evidence presented, the children's welfare would be served by the appointment of Barbara as guardian. Accordingly, the court issued orders granting Barbara full guardianship over the children under MCL 700.5204(2)(b). A few days later, Adam moved to dismiss and filed a motion for relief from the guardianship orders. Those motions were denied, and on September 13, 2019, the court ordered that Adam return his children to Michigan. Adam has not complied with this order or any subsequent orders requiring the children's return, and it appears that the children remain with him in Texas.

On December 4, 2019, Adam filed a delayed application for leave to appeal in the Court of Appeals. He argued that his constitutional right as a presumptively fit parent were violated when the guardianship orders were entered pursuant to MCL 700.5204(2)(b) and that the probate court should have denied the petitions on the basis of the evidence presented at the hearing. In a published opinion, the Court of Appeals affirmed the probate court's guardianship orders. *In re Versalle Guardianship*, 334 Mich

App 173 (2020). The Court of Appeals concluded that MCL 700.5204(2)(b) implicitly includes a presumption of parental fitness that, "in essence, protects a parent's decision regarding his or her child until that decision reflects that the parent is no longer adequately caring for the child." *Id*. at 180. Put another way, "in coming under the purview of MCL 700.5204(2)(b), respondent had essentially stopped providing adequate care for the children, i.e., became unfit." *Id*. at 182. The panel also concluded that there was sufficient evidence to grant a guardianship because, at the time the petitions were filed, Adam had given Barbara permission for the children to reside with her and he had not given her legal authority over the children. *Id*. at 186.

Adam appealed in this Court and we ordered oral argument on the application, *In re Versalle Guardianship*, 507 Mich 995 (2021), directing the parties to address whether MCL 700.5204(2)(b) is unconstitutional because it fails to include a presumption that a fit parent's decision is in the best interest of the child, see *Troxel v Granville*, 530 US 57 (2000). We also asked whether the probate court erred by granting petitioner guardianship in this case. Following oral argument, we directed the parties to submit supplemental briefing on whether the requirements of MCL 700.5204(2)(b) must be met at the time the petition is filed or at the time the guardianship determination is made and whether the statutory requirements were met in this case. *In re Versalle Guardianship*, ___ Mich ___; 967 NW2d 238 (2021). In addition to responses from the parties, we have received input from amici, including the State Bar of Michigan Family Law Section, the Legal Services Association of Michigan, and the State Bar of Michigan Children's Law Section. After all this, the Court denies leave to appeal. I respectfully dissent from this decision.

First, I agree with the Court of Appeals that Adam's constitutional challenge to MCL 700.5204(2)(b) must fail. To lodge a successful facial challenge to a statute, a litigant "must establish that no set of circumstances exists under which the act would be valid." *League of Women Voters of Mich v Secretary of State*, ___ Mich ___, ___ (2022) (Docket Nos. 163711, 163712, 163744, 163745, 163747, and 163748); slip op at 8 (quotation marks, citations, and brackets omitted). As this Court has explained, parents have a fundamental right and liberty interest in the care, custody, and control of their children. *In re Sanders*, 495 Mich 394, 409 (2014). There is a presumption that fit parents act in the best interests of their children. *Troxel*, 530 US at 68. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id*. at 68-69. The Court of Appeals in this case concluded that MCL 700.5204(2)(b) adequately encompassed the required constitutional presumption because, by falling under the purview of the statute—that is, by allowing the child to reside with a third party without providing that third party with legal authority for the child—a parent may be considered unfit. I agree with the Court of Appeals that, at least

in some instances, the statutory requirements of MCL 700.5204(2)(b) are a sufficient stand-in measure for parental fitness; therefore, Adam's facial challenge must fail.[1]

While I believe that the statute is facially constitutional, I believe that the probate court abused its discretion when it granted the guardianship orders in this case because the statutory conditions were not satisfied at the time of the guardianship hearing. Again, MCL 700.5204(2)(b) grants the probate court the discretion to appoint a guardian if certain enumerated circumstances "exist," including that "[t]he parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed." There are several contextual clues that lead me to conclude that, contrary to the position taken by both petitioner and respondent, the statutory conditions must be met *both* when the petition is filed *and* at the time of the guardianship hearing.

"When interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute, which requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *In re AJR*, 496 Mich 346, 353 (2014) (quotation marks, citations, and brackets omitted). First, MCL 700.5213(2) provides that the trial court shall appoint a guardian only "[u]pon hearing" if the court finds that "the requirements of section 5204 . . . *are* satisfied." (Emphasis added.) This indicates that the conditions of MCL 700.5204(2)(b) must be present at the time the hearing is conducted. Second, MCL 700.5204(2) speaks to whether any of the listed circumstances "exist." This language indicates that the findings must be based on conditions that exist

[1] If a parent allows their child to live with a third party indefinitely and has no further involvement, the statutory requirements easily rebut the parent's presumptive fitness. However, I can envision scenarios where coming under the purview of MCL 700.5204(2)(b) would *not* be sufficient to rebut the presumption of parental fitness. For example, it is not hard to imagine a single parent who works in a healthcare setting during a global pandemic arranging for a neighbor or family member to care for their children indefinitely in order to lessen the children's exposure to a virus. In that hypothetical scenario, the parent permits the children to reside with a third party and, if they also fail to provide legal authority to the caregiver, the statutory requirements of MCL 700.5204(2)(b) are satisfied. Under these facts, if the statute was used to secure a guardianship against the parent's wishes, I think that the parent would have a strong likelihood of success in an as-applied challenge to the constitutionality of the statute. That being said, the intricacies of such a particular legal theory might be difficult for the parent to make in opposition to the guardianship proceedings without the assistance of counsel. See *In re Orta Guardianship*, ___ Mich ___; 962 NW2d 844 (2021) (Docket Nos. 1661118 and 161119) (CAVANAGH, J., concurring).

in the present tense at the time of the hearing. Third, MCL 700.5204(2)(b), while not artfully drafted, contains two separate clauses. The first requires that "the parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance." This clause does not provide a time-frame and, therefore, it makes sense to refer back to the fact that these conditions must "exist" at the time of the hearing. The second clause is set off from the first with the word "and" as well as with a comma and requires that "the minor is not residing with his or her parent or parents *when the petition is filed*." (Emphasis added.) This construction supports the view that "when the petition is filed" refers only to the antecedent "the minor is not residing with his or her parent" and does not modify the timing for the other conditions that must exist at the time of the hearing.[2]

In this case, there is no debate that the statutory conditions existed when Barbara filed the guardianship petitions. The children were not residing with Adam at the time the petitions were filed, Adam was permitting his children to reside with Barbara, and Adam had refused to provide Barbara with legal authority for their care and maintenance. It is also undisputed, however, that by the time the probate court held the required hearing, the statutory conditions had materially changed. Specifically, Adam had revoked his permission for his children to reside with Barbara because he had taken them to live with him in Texas. As the court noted, it was clear that by doing this, Adam intended to reclaim custody of his children. Because the statutory conditions did not exist at the time of the hearing, the probate court abused its discretion by granting the petitions. See *Redd*, 321 Mich App at 403.

This case demonstrates why I believe it is important to read the statute's plain language to require that the conditions exist at the time of the hearing in order to save it from unconstitutionality. Adam is presumed to be a fit parent. See *Sanders*, 495 Mich at 412 ("[A]ll parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."). Assuming that the existence of the statutory conditions was an adequate basis to rebut Adam's parental fitness at the time the petitions were filed, those conditions no longer existed once Adam took back custody of his children, and his presumption of fitness remained intact. As a presumably fit parent, Adam rightfully reestablished his constitutional right to direct the care, custody, and control of his children by retrieving them and bringing them to live with him in Texas. See *Sanders*, 495 Mich at 411. It is argued that this reading of the statute would allow a

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[2] While the minor must not be residing with their parent "when the petition is filed," despite the statutory language not explicitly stating as much, it seems that this condition must also continue to "exist" at the time of the hearing. If the minor is residing with their parent at the time of the hearing, it is unclear why a guardianship under MCL 700.5204(2)(b) is necessary. If a guardianship is needed in that instance, a parent can consent to a limited guardianship under MCL 700.5205.

parent to defeat a petition for guardianship by taking back physical custody of the child postpetition or appearing at a guardianship hearing and revoking permission, even though the statutory conditions were met at the time the petition was filed. But a parent who has not been adjudged to be unfit retains the right to do exactly that. The presumption of parental fitness suggests that it should not be easy to alter a parent's constitutional right to care for their child. If a parent is alleged to be unfit but the statutory conditions for a guardianship are not established, the appropriate way to investigate if removal of the child from the parent's care is warranted is to institute a protective proceeding. This process comes with a myriad of procedural protections for both the parent and the child (appointment of counsel, appointment of a lawyer-guardian ad litem, statutorily mandated reunification services, etc.) that are not available when a third party seeks to retain custody over a child in a guardianship proceeding. To impose a guardianship against a parent's wishes where the statutory requirements are not met—*both* when the petition is filed *and* when the hearing occurs—is an unacceptable shortcut around multiple laws that protect the constitutional rights of parents and children.[3]

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[3] I acknowledge the statutory history presented by the parties which demonstrates that, soon after MCL 700.5204(2)(b) was enacted and before it became effective, the statute was amended to include the final clause. See *People v Pinkney*, 501 Mich 259, 276 n 41 (noting that statutory history is a proper contextual consideration). This sudden change to the statute, in conjunction with legislative history materials submitted by the parties, suggest that through this amendment the Legislature purposefully aimed to indicate that the relevant timing for all the requirements is "when the petition is filed." The Legislature, however, passed MCL 700.5204(2)(b) and its subsequent amendment without the benefit of the Supreme Court's decision in *Troxel*, 530 US at 68, which established the clear principles that parents are presumed to be fit and that fit parents are presumed to act in their children's best interests. This Court has a duty to construe statutes as constitutional whenever possible. *Sanders*, 495 Mich at 412-413; see also *People v Neumayer*, 405 Mich 341, 362 (1979) ("It is axiomatic that this Court will presume that all legislation is constitutional and will attempt to construe legislation so as to preserve its constitutionality."). Unlike my concurring colleague, I would not accept the admittedly clear statutory history to read the statute in such a way that it remains "constitutionally hazardous." Instead, I would observe this Court's duty to construe legislation in a way that preserves its constitutionality. In this case, that duty means reading the statute's plain language in a way that defers to and gives weight to the decisions of presumably fit parents; otherwise it irreconcilably conflicts with the presumption of parental fitness. That said, I share Justice WELCH's concerns that the Child Custody Act, MCL 722.21 *et seq*., appears to provide additional protections not included in the EPIC guardianship scheme, and I echo her invitation to the Legislature to consider amending the guardianship framework.

Finally, even if the statute were properly construed as requiring that the conditions be met only at the time that the petition is filed, I would still conclude that the probate court abused its discretion in this case. MCL 700.5204(2)(b) provides that, if the relevant circumstances exist, the court "*may* appoint a guardian." This is permissive, not mandatory, language. In light of the change in circumstances between the petitions' filing date and the hearing, including the fact that the children were residing with their father in Texas and no longer in need of a guardian, I believe it was an abuse of discretion to grant the petitions in this case. For all these reasons, I respectfully dissent from this Court's denial order. Instead, I would vacate the Court of Appeals' opinion and remand to the probate court to vacate the guardianship orders.

MCCORMACK, C.J., and BERNSTEIN, J., join the statement of CAVANAGH, J.